IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8 AND ONTARIO REGULATION 283/95

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

CHUBB INSURANCE COMPANY OF CANADA

Applicant

- and -

AVIVA CANADA INC. and INTACT INSURANCE

Respondents

DECISION

COUNSEL

George Kanellakos – Blouin, Dunn LLP
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Lawyer for the Respondent, Aviva Canada Inc.

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ISSUE

The central issue in dispute between the parties is which of Chubb Insurance Company of Canada ("Chubb"), Aviva Canada Inc. ("Aviva") or Intact Insurance ("Intact") is required to pay benefits under Section 268 of the *Insurance Act* to or on behalf of Daniel Baena, arising out of his involvement in a motor vehicle accident that occurred on August 12, 2011? There are three sub-issues:

1. Was Daniel Baena **principally dependent for financial support or care** on his father, Juan (Jonathan) Baena-Menendez, resulting in Daniel Baena being considered an insured person under the policy of Chubb insuring Juan (Jonathan) Baena-Menendez' Infiniti motor vehicle, within the meaning of section 3(1) of O. Reg. 34/10 the *Statutory Accident Benefits Schedule* ("the SABS"), made under the *Insurance Act*?

2. **At the time of the accident**, was a motor vehicle or motor vehicles being made available for Daniel Baena's **"regular use"** by Contour Landscaping, resulting in Daniel Baena being considered an insured person under Aviva's policy insuring Contour Landscaping's motor vehicle or motor vehicles, within the meaning of section 3(7)(f)(i) of O. Reg. 34/10 the *Statutory Accident Benefits Schedule* ("the SABS"), made under the *Insurance Act*?

3. If neither Chubb Insurance Company of Canada nor Aviva Canada Inc. are required to pay benefits under Section 268 of the *Insurance Act* to or on behalf of Daniel Baena, is Intact Insurance required to pay benefits as the **insurer of the other automobile involved in the incident** from which the entitlement to statutory accident benefits arose?

PROCEEDINGS

This matter proceeded before me on the basis of document briefs, Examination Under Oath transcripts, written submissions, Books of Authority and oral submissions which took place on September 23, 2013.

GENERAL OVERVIEW

On Friday, August 12, 2011, Mr. Daniel Baena was involved in a motor vehicle accident while he was operating an uninsured motorcycle owned by his father, Juan (Jonathan) Baena-Menendez. Mr. Baena's uninsured motorcycle was struck by a 1999 Nissan motor vehicle which was insured by Intact.

At the time of the accident Mr. Daniel Baena did not own a motor vehicle. Mr. Daniel Baena did not have a motor vehicle liability policy of his own, nor was he a named or listed driver under any motor vehicle liability policy.

At the time of the accident Mr. Daniel Baena's father, Juan (Jonathan) Baena-Menendez, was the named insured under a motor vehicle insurance policy issued by Chubb. Chubb insured Mr. Baena-Menendz' personal motor vehicle, a four-door Infiniti.

At the time of the accident, Mr. Daniel Baena was employed by Contour Landscaping and had available to him one or more of the Contour Landscaping company vehicles for his "regular use" subject to certain restrictions as to their use by his father as an owner of Contour Landscaping. The Contour Landscaping vehicles were insured by Aviva.

Mr. Daniel Baena sustained significant injuries in the accident. He was taken to Sunnybrook Hospital by ambulance. Mr. Baena made a claim for statutory accident benefits to Chubb. As As the first insurer to have received an application Chubb was required to pay accident benefits pending a priority determination. Chubb continues to pay statutory accident benefits to or on behalf of Daniel Baena pending the present priority determination.

Chubb delivered a "Notice to Applicant of Dispute Between Insurers", dated October 20, 2011, to Aviva. Chubb also delivered a "Notice to Applicant of Dispute Between Insurers", dated November 4, 2011, to Intact.

APPLICABLE LEGISLATION

A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefit claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the Insurance Act sets out the priority rules to be applied to determine which insurer is liable to pay statutory accident benefits.

As Daniel Baena was an occupant of a vehicle (albeit uninsured) at the time of the accident, the following rules with respect to priority of payment apply:

> *(i) The occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured;*
>
> *(ii) If recovery is unavailable under (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*
>
> *(iii) If recovery is unavailable under (1) or (2), the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose;*
>
> (iv) *If recovery is unavailable under (1), (2) or (3), the occupant has recourse against the Motor Vehicle Accident Claims Fund.*

Section 2 (1) of the Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996, Ontario Regulation 403/96, as amended, defines an "insured person" as follows:

> (a) "The named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured, and any dependant of the named insured, spouse if the named insured, specified driver, spouse or dependant,
>
> (i) is involved in an accident in or outside of Ontario that involves the insured automobile or another automobile."

Section 2 (6) of the Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996, Ontario Regulation 403/96, as amended, reads as follows:

> *"For the purposes of this regulation, a person is a dependant of another person if the person is principally dependant for financial support or care on the other person or the other person's spouse."*

Section 3(7)(f) of the Statutory Accident Benefits Schedule provides:

> *"an individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident, if at the time of the accident,*
>
> > *(i) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity; or*
> >
> > *(ii) the insured automobile is being rented by the individual for a period of more than 30 days.*

DEPENDENCY

In the following paragraphs, I will highlight the facts before me with respect to the issue of dependency.

Mr. Daniel Baena was born on July 29, 1986. He was 25 years old at the time of the motor vehicle accident.

Mr. Daniel Baena is not married. He has no children.

As outlined below, Mr. Daniel Baena's evidence was that he lived on his own, for approximately 10 months to one year before the subject accident. In October or November of 2010, he moved into a home purchased by his father [because he wanted to be with his family rather than for financial reasons]. For the first two to three months Daniel Baena lived in the basement, while the home was occupied by the former owner. Daniel's father and sister moved into the home approximately two to three months after Daniel had moved in.

Mr. Daniel Baena further testified, *inter alia*, that he worked in landscaping at his father's company in the year before the subject accident. He was paid $700 per week, although he received $800 in bi-weekly cheques, with the balance of his salary going towards his rent. He also worked for his uncle, Mike, and was paid to assist with his furniture and art shows. Mr. Daniel Baena also testified that he was able-bodied and responsible for all of his personal care, housekeeping and cooking before the subject car accident.

At the time of the accident, Mr. Daniel Baena was working full time and earning a significant income.

For the purposes of an "Occupational Therapy Report", conducted on September 14 and September 27, 2011, Mr. Daniel Baena reported, in part:

- *Mr. Baena reports that prior to the accident he was working full time for his father's landscaping and property management company. He describes that his work responsibilities included a number of physically demanding tasks, such as cutting grass, planting trees, and completing general maintenance of outdoor commercial spaces. Mr. Baena reports that he had been working in this capacity for approximately 6 months.*

- *Prior to this he had worked for one year delivering furniture and art. His job duties in this position included driving and loading/unloading trucks.*

Mr. Daniel Baena testified [and reported] that he began working at Contour Landscaping on February 1, 2011. His job included general labour and landscaping work, such as grass, flowers, trees, raking, interlocking, and snow removal. He was also involved with the marketing and business development of the company.

Mr. Daniel Baena testified that he worked Monday to Friday for 30-35 hours per week (8:00 a.m. to 5:00 p.m. every day) and that he earned $700 per week. He was paid in cash and by cheque. Mr. Daniel Baena received bi-weekly cheques in the amount of $800. This evidence is consistent with the information that he provided on his Application for Accident Benefits (OCF-1) and the Employer's Confirmation Form (OCF-2).

Mr. Daniel Baena testified that a portion of his salary would be withheld for rent so, although he was paid $800 every two weeks by cheque, the total amount compensated for his work at Contour Landscaping was $1,400 every two weeks. In addition, he received additional cash each month for his work with his father.

Apart from work at Contour Landscaping, Mr. Daniel Baena also worked for his "uncle's art shows". His uncle, Michael Maman, owned a furniture and art business and held daily art shows. Mr. Daniel Baena testified [and reported] that he had worked with him a few months every year for the last seven years. He confirmed that he worked for his uncle in the year before the accident, during the time in which he lived alone.

Mr. Daniel Baena worked three to four days per week with his uncle earning approximately $100 to $200 per day. His job responsibilities included unloading and loading the truck, setting up the furniture show and art show, setting up the easels, arranging the presentation of the furniture and art, and taking it down at the end of the night.

Significantly, while he lived alone, Mr. Daniel Baena financially supported himself with income earned from working with his uncle on the daily arts show, in addition to his own savings.

Of note, as a result of the subject accident, Mr. Daniel Baena's lawyer confirmed "on the record" that Mr. Daniel Baena intends to make a claim for past income loss as well as future income loss in his "tort" action.

As part of his accident benefits claim, Mr. Daniel Baena claims entitlement *inter alia* to income replacement benefits at the rate of $400 per week from January 22, 2013 "ongoing".

Mr. Daniel Baena testified that, before the subject accident, he was healthy and was able to work. Specifically, he testified:

> Q. And, sir, I'll ask you directly. You were working before the accident, and as far as you know, you were able to work before the accident, correct?
>
> A. Yes.

Q. You had no problems with working?

A: No.

Q: You had no problems earning a living before the accident?

A: No.

Q: And in fact, you've already told us you when you were living in an apartment, you were supporting yourself, correct?

A. Yes.

Q: And you moved in with your dad, because you wanted to be with your family, and not for financial reasons, correct?

A: Correct.

Mr. Daniel Baena testified that, before the subject accident, he had no physical problems or limitations with respect to work. He was able to work with his uncle, Mike, on his art shows and, in fact, was able to do physical construction work for his uncle, Prosper. From a health perspective, physically, emotionally, and mentally, there was nothing that prevented him from working.

Mr. Daniel Baena testified that he lived alone in his own basement apartment located at Bathurst and Sheppard for ten months to one year [this was prior to moving into 51 Loma Vista Drive - the home purchased by his father]. The home was owned by his uncle, Prosper Lugassy. Mr. Daniel Baena confirmed that he independently paid the $1,000 per month rent at this apartment from his own income and savings. Mr. Daniel Baena also completed construction renovations in his uncle's house in exchange for [rent] living in the basement apartment.

Mr. Daniel Baena confirmed that he took care of his own apartment and his own personal care while living alone. Around this time he also purchased a dog, a big Italian Mastiff, which he took care of on his own.

Mr. Daniel Baena testified that his father and mother did not provide any financial support while he lived on his own.

Mr. Daniel Baena testified that he was responsible for cooking and cleaning his basement apartment, with no assistance from his parents.

For the purposes of an "Occupational Therapy Report", conducted on September 14 and September 27, 2011, Mr. Baena reported, in part:

- *Mr. Baena was responsible for all cleaning, cooking and home maintenance activities in his basement apartment. He describes himself as a "neat freak" and was particularly diligent about cleaning up after his dog (e.g. vacuuming dog hair, changing filters in vacuum)*

After conducting assessments over two days, Ms. Heather Reznick, Occupational Therapist, concluded, in part:

- *Prior to the accident Mr. Baena was an independent, active and social person. He lived in a basement apartment in his father's home, and independently managed his own cooking, grocery shopping and housekeeping.*

Mr. Daniel Baena testified that he moved into the basement apartment of his father's home in or around October or November of 2010. Significantly, Mr. Baena testified:

> Q. Why did you decide to move back in with your dad?
>
> A. I moved out because the divorce was happening, you know, I moved out. My dad settled down, figured things out, and he decided to buy a house so we could live together again.
>
> Q. Okay. So is it fair to say it was primarily just so you could live with your dad?
>
> A. No, he didn't buy the house so that I could live with him. I only moved out because, like, the divorce was happening and there was trouble at home, and stuff like that. So once that cleared up, he bought a house where we could live altogether, my sister and him again as a family.
>
> Q. So you preferred to live with your dad and your sister?
>
> A. Yes, I would prefer that, yes.
>
> Q. Was there any financial basis for you moving back, did you -- --
>
> A. No.
>
> Q. Okay. So you were still able to afford your apartment?
>
> A. Yes.
>
> Q. But you moved because you wanted to be with your family?
>
> A. Well, yeah.

Mr. Daniel Baena testified that he had an agreement with his father for payment of $800 per month for rent.

Mr. Daniel Baena testified that he was responsible for the whole basement apartment of his father's home, including the cleaning and laundry. He did most of the cooking and would only at times join his father for meals.

Mr. Daniel Baena testified that his basement apartment was a completely separate unit from the rest of the house – it had its own separate entrance, kitchen, and bathroom.

Mr. Daniel Baena testified that when he lived alone in his uncle's basement apartment [located at Sheppard and Bathurst], he paid for groceries and expenses with the money that he earned.

Mr. Daniel Baena testified that he was able to manage financially while he lived alone. His various expenses included groceries, rent, cable/television, maintenance of the apartment, car maintenance, and cellphone bills. Mr. Daniel Baena also testified that he paid for his own food, clothing, and for the care for his dog. He even bought his own washing and drying machines.

Mr. Daniel Baena testified that when he lived in the basement apartment of his father's home, he paid for his own toiletries, such as deodorant and shampoo. He would also buy additional groceries for himself. He also testified that he was financially responsible for his dog and paid for all related expenses, such as veterinary services and dog food.

There is considerable jurisprudence on the issue of dependency.

As I have held in several of my other decisions regarding the issue of dependency, I am satisfied that the criteria to be used in determining financial dependency, for the purposes of the Statutory Accident Benefits Schedule, was established by the Court of Appeal in Miller v. Safeco 1986, 13 C.C.L.I. 31. In that case, the court held that the relevant criteria were:

(i) Amount of dependency;

(ii) The duration of the dependency;

(iii) The financial and other needs of the alleged dependent; and

(iv) The ability of the alleged dependent to be self-supporting.

The aforesaid criteria has been adapted by several Arbitrators in the context of priority disputes involving the issue of dependency.

As I have in previous decisions involving dependency, I also accept the principals set out in Federation Insurance Company of Canada v. Liberty Mutual Insurance Company (Arbitrator Samis, May 7, 1999). The decision highlights the importance of selecting an appropriate time frame for the analysis of financial dependency. Relationships change from time to time, perhaps suddenly. Transient changes may alter matters for a short period, but not change the general nature of the relationship. A momentary snapshot would not yield any useful information about these time dependent relationships. It is the general nature of the relationship that must be viewed based on the analysis provided by Arbitrator Samis. Arbitrator Samis also deals with the issue of earning capacity as opposed to actual earnings. I accept the proposition that the ability to be self-supporting must be taken into account in measuring dependency. An intelligent, able-bodied individual fully capable of employment, who chooses to live at home with his parents ought not to be considered dependent upon them. I also accept the proposition that "dependency" implies something more than receipt of financial benefit. It requires some kind of need on the part of the person alleged to be dependent. A very wealthy person might receive food, shelter and other financial benefits from family, but this would not support a conclusion that the person is principally dependent upon the family structure.

When looking at the question of financial dependency, the related case law provides that in order to be principally dependent for financial support, one must receive more than 50% of one's financial needs from someone other than themselves.

Ref: *Liberty Mutual Insurance Co. v. Federation Insurance Co. of Canada,* [2000] O.J. No. 1234 (C.A.)

State Farm v. American Home Assurance and York Fire (Arbitrator Guy Jones, November 2002) at pgs. 14 – 16.

Allstate and ING (Arbitrator Lee Samis, August 18, 2011) at pgs. 4 – 6.
Security National and Axa (Arbitrator William McCorriston, February 15, 2011) at pgs. 3 - 6.

The calculation of "50 + 1" requires an analysis of the claimant's monthly expenses, income, savings and assets. The concept of money's worth is also used by arbitrators to determine a claimant's financial picture at the time of an accident. This assessment is not necessarily an assessment of the exact financial snapshot on the day of the accident, but rather a consideration of the personal history of the alleged dependant over some period of time in order to reflect the true financial situation of the parties at the time of this accident.

Ref: *Gore Mutual Insurance Company v. Co-operators General Insurance Company*, 2008 CanLII 46914 (ON S.C.) at para. 8.

Allstate and ING (Arbitrator Lee Samis, August 18, 2011) at pg. 4.

On the evidence before me it is clear that Mr. Baena was <u>not</u> principally financially dependent on his father at the time of the collision. I am satisfied that Daniel Baena was earning sufficient income to live independently if he chose to do so. whether working for his father or as an able bodied young man for some other employer. Although his father may have contributed to his financial situation with accommodation below what might be considered market rates and provided use of his personal vehicles, such contribution on the evidence before me comes nowhere near the "50 + 1 %" required to prove "principal financial dependency".

<u>REGULAR USE</u>

Daniel Baena's father, Juan Baena-Menendez, owned and operated Contour Landscape and Design Inc..

Contour Landscape owned five pick-up trucks which were used by its employees. These vehicles were insured with Aviva.

Daniel drove the vehicles as part of his job tasks.

In particular, Daniel drove a Ford 350 pick-up truck.

Daniel drove the vehicles commencing in or about February 2011 and therefore did so for close to one-half year before the accident.

In addition to operating the vehicles in the course of his employment, Daniel drove them to and from work. He also used the vehicles for personal errands.

Daniel had access to a credit card to purchase gasoline for the company vehicles.

The Ford 350 pick-up truck was typically parked at the Baena-Menendez home and was parked in the driveway of his home on the night of the collision herein.

It is clear on the evidence that Daniel Baena had "regular use" of his employers vehicles but the crucial issue is whether a "vehicle was being made available to him at the time of the accident". The leading case interpreting these words is that of ACE INA Insurance v. Co-operators General Insurance Co. [2009] O.J. No.1256, the 2009 appeal decision of Belobaba, J. of the Ontario Superior Court.

In the ACE INA decision, the claimant was a passenger in a friend's car going downtown late on a Saturday night. The claimant was an employee of Enterprise Rent-a-Car and regularly drove company vehicles while at work. He had not worked for nine days. Justice Belobaba held that the claimant did not have the company vehicle "available to him at the time of the accident" and therefore the claimant was not a deemed named insured in the policy issued to his employer.

Justice Belobaba was dealing with Section 66(1) of the Statutory Accident Benefits Schedule, which is the identically-worded predecessor Section to the current Section 3(7)(f) of the Insurance Act. Justice Belobaba writes:

> *"In other words, the focus in s.66(1) is whether at the time of the accident a company-insured car was being made available to the individual.*
>
> *The question is not whether the car would be available to the claimant when he went back to work the next day, but was it being made available to him at the time of the accident, when he was off work and on his way downtown in a friend's car.*
>
> *To help answer this question, it is important to understand that section 66(1) can apply even if the injured employee was not actually driving the company vehicle at the time of the accident. Two examples:*
>
> > *The employee is driving the company vehicle during work hours, but then stops to buy a coffee at a restaurant. While crossing the street as a pedestrian, he is struck by another car. Section 66(1) would apply and his employer's auto insurer would pay the accident benefits.*
> >
> > *The employee drives the company car as a sales rep but is allowed to take the car home and use it for personal transportation. On a Saturday evening, he leaves the car in his driveway and is a passenger in his friend's car when they are involved in a car accident and he is injured. Section 66(1) would again apply and the company's insurer would pay the accident benefits.*

> *The point of s.66 is that accident benefits are to be paid by one's employer's auto insurer if at the time of the accident, a company car is being made available to the injured employee, ie. is accessible to him – even if he is a pedestrian or a passenger in someone else's car.*
>
> *In our case, how can it be said that at the time of the accident (in the late evening hours when the claimant was on his way downtown as a passenger in a friend's car) that an Enterprise automobile was being made available to him for his regular use, or indeed for any use?"*

It is clear that Justice Belobaba in ACE found that for the section to apply, the vehicle had to be "accessible" to the claimant "at the time of the accident". Justice Belobaba further writes:

> *"I agree with Mr. Samis, counsel for ACE, that by adding the phrase 'at the time of the accident' and the word 'being' next to the phrase 'made available', the legislature intended to extend coverage to an individual only where the insured vehicle is contemporaneously being made available for his regular use."*

It is clear from the appeal decision in ACE, the claimant who is an employee is required to have contemporaneous accessibility to the vehicle for the section to apply.

Aviva takes the position that Daniel did not have access to the company truck parked in the driveway of his home on the night of the accident because of the restrictions placed on it's use by his father.

Daniel testified at his 2012 Examination Under Oath that his father was very strict that the Contour Landscaping trucks were to be used for work purposes only – not for personal purposes.

> 206. Q. Did you ever use it for personal use, too? If you had to go to the grocery store, if you had to go to a friend's house, was it available to you to use for that purpose?
>
> A. No, my dad was kind of strict about that, he would always say it was for work purposes only, it's a work truck.

Daniel reiterated the above at his 2013 Examination Under Oath.

At Juan's 2013 Examination Under Oath, Juan confirmed that the Contour Landscaping trucks were not to be used for personal reasons.

> 940. Q. And he used it for that. However, all other times, there were restrictions on the work truck put by you, saying that: `No, this a company truck' ---
>
> A. That's correct.
>
> 941. Q. --- you're not supposed to use it for personal reasons'?
>
> A. That's correct.

While Daniel and Juan testified that once or twice Daniel had permission to use the Contour Landscaping truck to pick up something that wouldn't fit in the back of the Infiniti, this was an exception to the rule that the Contour Landscaping trucks were only to be used for work, not personal purposes.

It was an unwritten "word of mouth" company policy that Contour Landscaping trucks were not to be used for personal reasons – only for work.

> 897. Q. Okay. And how did they know that? Was there a written policy? Would you just tell them?
>
> A. It was pretty much common knowledge that they were working trucks and they were not to be using them for their own, since they have their own vehicles.

Specifically, if an employee had to take a Contour Landscaping truck home for the day (because it was required for the job site the next day), it had to be parked in their driveway and they had to use their own personal cars for personal transportation.

> 895. Q. Okay, so if one of your employees, they knew they took it home that night ---
>
> A. Yes.
>
> 896. Q. --- they understood the rule to be that they could not use it for personal use?
>
> A. The car would have to be park (sic).

Juan testified that Daniel was not allowed to use the Contour Landscaping trucks to go out for personal reasons.

> 949. Q. Okay. So it's my understanding that just to clarify this and to wrap this up ---
>
> A. Okay.
>
> 950. Q. --- that in the event that Daniel wanted to use the company truck ---
>
> A. Yes.
>
> 951. Q. --- for personal reasons ---
>
> A. What would be a personal reason, for example?
>
> 952. Q. Okay, so in the event that he wanted to, say, you know, go out with his friends for the evening out to a restaurant ---
>
> A. No.

Daniel was not allowed to use the Contour Landscaping truck to go out with his friends after work.

967. Q. So you would never let him use the company truck to go out with his friends after work?

A. No.

Daniel was not allowed to use the Contour Landscaping truck on weekends.

969. Q. Did you ever let him use the company truck on weekends?

A. If he's used the company truck on the weekends? I don't know.

970. Q. Well, I'm talking -- but I'm talking about: Was it your standard practice, based on what you've told me ---

A. My standard practice is that the cars -- the trucks were working trucks and they were not vehicles that you can -- especially because of their size, that you can move around the city very easily. No, that's correct, yes.

Daniel was not allowed to use the Contour Landscaping truck to go to the mall.

971. Q. Okay, so did -- it wasn't like, you know, he'd say: `Hey, Dad, I want to go to the mall with my friends today'?

A. No. That's the answer.

972. Q. No?

A. No.

When specifically asked whether Daniel could have used the Contour Landscaping truck on the evening of the accident to go meet his mother for dinner, Juan testified emphatically "No.".

999. Q. So would it be fair to say that, given on the night of the accident ---

A. Okay.

1000. Q. --- he had a motorcycle available to him ---

A. Yes.

1001. Q. --- based on what your evidence is, is that the company trucks are used for work purposes only, would Daniel have been able to use the company truck? Like, could he have made the choice: Oh, I'm going to use the company truck tonight for personal reasons to go see my mom for dinner?

A. No.

1002. Q. No?

A. No.

Intact submits that these questions and answers as outlined above are different than the question "would you have let him take it, if asked?" Intact submits that if asked he would probably allowed him to use the vehicle that night. Historically, he had used the vehicle for personal errands on occasion and as a result had the equivalent of "implied consent" and since the Statutory Accident Benefits Schedule is remedial in nature, it should be given a broad and liberal interpretation that best achieves the object and intent of the legislation, that is to deliver accident benefits to claimants.

I fully accept that the legislation is remedial in nature and ought be given a broad and liberal interpretation but on the evidence before me I cannot help but conclude that given the restrictions imposed by his father as to use of the company truck as outlined above, it was "not available to him at the time of the accident" and therefore S.3(7)(f) of the Schedule is not applicable to make the claimant a "deemed named insured" under the Aviva policy. I find that on the evidence overall that the company truck was not for personal use, save in rare exceptions when the family's personal vehicles were not large enough to transport furniture or other large objects. In particular the company truck was not available when other of the family's vehicles were. There was evidence before me that the father was in Sault Ste Marie at the time of this accident. The father's Infiniti motor vehicle was also at home. The evidence supports a finding that accessibility to the Infiniti for personal use was in priority to the company truck. In the final analysis, I find that the claimant did not have a choice to use the company truck that night given the restrictions imposed by his father and that if he asked him his father would probably have told him to use the Infiniti. No special circumstances existed on the evening of the accident so as to require use of the company truck (for example, moving furniture or some other large load) as opposed to the father's available personal automobile, namely the Infiniti.

ORDER

In the circumstances, I find that Intact is the priority insurer as being the insurer of a vehicle involved in the collision pursuant to S.268(2)(iii) of the Insurance Act. The claimant is not "an insured" under the Chubb policy as he was not "principally financially dependent" on his father at the time of the accident and he was not a "deemed named insured" under the Aviva policy as the company truck was not "available to him at the time of the accident" given the restrictions placed on it's use by his father and the availability of the father's personal private automobile.

I order that Intact adjust and fund the accident benefits claim of Daniel Baena. I hereby order that Intact indemnify Chubb for those benefits properly the subject matter of indemnification, plus interest calculated pursuant to the Courts of Justice Act. I hereby order that Intact pay the arbitration costs of Chubb and Aviva on a partial indemnity basis. I hereby order that Intact pay the Arbitrator's costs.

DATED at TORONTO this 11th)

day of November , 2013.)

KENNETH J. BIALKOWSKI
Arbitrator